



Decision

Matter of: Airgroup Express

File: B-256204; 256204.2

Date: July 15, 1994

DIGEST

Expired Guaranteed Traffic Tender cannot be used as basis for payment to carrier where unsigned extension sent to Military Management Traffic Command (MTMC), which MTMC argues extended the tender, was not accepted and distributed by MTMC until after the date the shipments were transported.

DECISION

Airgroup Express requests review of the General Services Administration's (GSA) deductions from current bills for overcharges assessed against Airgroup on various Government Bill of Lading (GBL) transactions. We reverse GSA's action.

Airgroup performed transportation services under the GBLs for the Department of Defense during February and early March 1993, from Defense Depot, Ogden, Utah, to various points in the continental United States, and billed for the charges on the basis of its Tender 16. In assessing overcharges, GSA, supported by the Military Traffic Management Command (MTMC), contends that the lower rates in Airgroup's Guaranteed Traffic Tender 600956 apply.

The record indicates that Airgroup's Tender 600956 was due to expire on January 29, 1993. MTMC states that on January 12, a conversation was held between MTMC and a responsible official of Airgroup and that Airgroup orally agreed to a 9-month extension. The next day, MTMC received a letter, by facsimile reproduction, that purported to agree to an extension. The letter was accompanied by Supplement No. 2 to Tender 600956, with a proposed expiration date of October 31, 1993. Neither the letter nor the tender supplement was signed by an Airgroup official. Airgroup has disputed the fact that issuance of the extension tender was authorized, and that a responsible Airgroup official had orally agreed to an extension.

On January 28, 1993, 1 day before the expiration of Tender 600956, Airgroup was advised by letter from the Defense Logistics Agency (DLA), Defense Distribution Depot, Ogden,

Utah, that it was to be removed from the guaranteed traffic program effective immediately because of poor service. MTMC did not officially remove Airgroup from the guaranteed traffic program until March 7, 1993, when it substituted another company, Right-O-Way, as the primary carrier.

Airgroup, in arguing that Tender 600956 does not apply here, points out that it was removed from the guaranteed traffic program before the shipments were effected, and that Tender 600956 had expired by then anyway. Airgroup argues that it thus had no obligation to continue to carry cargo pursuant to the expired Tender 600956.

GSA and MTMC contend that Airgroup orally agreed to a 9-month extension by telephone on January 12, which should bind the company. GSA further points out that the GBLs were annotated to the effect that Airgroup Tender 600956 applied, and the carrier's continued acceptance of shipments reflected an agreement to apply the rates provided in Tender 600956.

In addition, MTMC notes that pursuant to Item 44 of Airgroup's Tender 600956, Airgroup was obligated to honor its guaranteed traffic rates until MTMC removed it from the guaranteed traffic program on March 7, 1993. MTMC also contends that because the rates in Airgroup's Tender 16 are contract rates they cannot apply to guaranteed traffic shipments. Finally, MTMC points out that Item 32 in Airgroup's Tender 600956 provides that "alternation" with rates and charges in any other tender (e.g., Tender 16) for the same traffic are not permissible.

We find that GSA's deduction action taken on the basis of Airgroup's expired tender was improper. By the time the shipments were placed with Airgroup, DLA had removed the carrier from the guaranteed traffic program, and Airgroup's guaranteed traffic tender had expired prior to MTMC's assignment of a replacement carrier. The record is not conclusive on whether Airgroup actually did agree, orally, to extend Tender 600956, but the record does show that MTMC did not even time-stamp the unsigned extension tender until April 1, 1993, and then distributed it. This action postdates both the freight movements in issue, which occurred in February and early March 1993, and MTMC's replacement of Airgroup from the guaranteed traffic program with Right-O-Way on March 7.¹

¹ Airgroup protested the distribution of the tender by letter to MTMC in April 1993.

We have held that under MTMC's own procedures, shippers should not consider a tender to be a unilateral offer available for acceptance until MTMC accepts and distributes it. Starflight, Inc. - Reconsideration, B-212279, Sept. 2, 1986; see also, Riss International, 65 Comp. Gen. 912 (1986), for a further example of the necessity for approval by MTMC of a tender prior to the transportation being performed. While nothing precluded Airgroup from continuing to transport shipments after Tender 600956 expired, the offer reflected by that tender's rates no longer existed for shippers to accept. Airgroup's transportation of goods therefore should have been paid for in accordance with the applicable non-guaranteed tender, Tender 16.

Moreover, GSA's argument that the GBLs cited Tender 600956 as the rate authority for the shipments is not determinative of the parties' obligations. It is well-settled that the insertion of a tender number on a bill of lading is not conclusive as to the agreement and the government's obligations at law. Goulart Trucking, Inc., B-251140.4, Sept. 28, 1993; Sammons Trucking, B-241866, June 17, 1991; Double M Transport, Inc., B-236336, July 13, 1990.

We find no legal merit in MTMC's arguments regarding Items 44 and 32 of Tender 600956. As MTMC notes, Item 44 required the carrier to honor its guaranteed traffic rates until MTMC officially removed Airgroup from the guaranteed traffic program on March 7. Although that commitment may have existed had Airgroup's tender otherwise still been effective (i.e., during its initial period or while extended), we have held that the rates in a guaranteed traffic agreement remains in effect only until the expiration date or until MTMC assigns an alternate carrier with a definite start up date, whichever comes first. SEKO Air Freight, Inc., B-245255, Apr. 27, 1992. We do not believe Item 44 permits MTMC to hold a carrier to expired rates until a replacement is selected. Also, the non-alternating provision of Tender 600956's Item 32 is of no import in view of our conclusion that the tender was not in effect when the shipments took place.

GSA's settlement action is reversed.

/s/ Seymour Efros
for Robert P. Murphy
Acting General Counsel

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